Aeronautics Act. *Pennsylvania-Central Airlines Corp., et al., Motions*, 8 C. A. B. 685, 696 (1947). That Act, moreover, unlike the Federal Power Act, specifically authorizes the Board to exempt arrangements for the pooling and division of earnings from the antitrust laws (49 U. S. C. §§492, 494). *The Pennsylvania-Central* decision was affirmed by this Court in *T. W. A.* v. *C. A. B.*, 336 U. S. 601 (1949) which held that the normal method of rate regulation by prescribing the *amount* to be charged "forces carriers within a given class to compete in securing revenue and in reducing or controlling costs" (pp. 606-7).*

In a recent decision** the Interstate Commerce Commission stated with regard to its express power to exempt revenue pooling arrangements from the antitrust laws:

> "The object of pooling arrangements is ordinarily the restraint of competition, the statute directing that we find, in approving the arrangement, that such restraint shall not be undue."

(d) The D. C. Majority Misconstrued the Decision of the Fourth Circuit.

The D. C. majority attempted to distinguish the decision of the Fourth Circuit by stating (R., Vol. 18, pp. 53-54) that the Fourth Circuit only declared illegal certain "restraints exercised by Baltimore Company upon Penn Water" under the provisions of the Baltimore contract, implying that the Fourth Circuit's opinion did not apply to other parts of the

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* See also *United-Western, Acquisition Air Carrier Property*, 8 CAB 298, 321 (1947), in which the CAB stated: "the established policy of this Board * * * recognizes that differences in the return may accrue to different carriers operating under the same rates and * * * permits management to retain the profits of its economies as an incentive toward the accomplishment of decreased costs and increased revenues. The incentive which the Board's rate policy holds out to air carriers to profit from economies which produce a better-than-average return upon investment itself invalidates the assumption that the rate-making process is an instrument of precision which produces a mathematically precise rate of return."

** *Application of Pullman Co. under Sec. 5(1), I. C. C. Act*, 259 I. C. C. 41, 43-5 (1944).

contract. However, the Fourth Circuit declared the *entire contract*, not merely the restrictive provisions thereof, to be void and of no effect (R., Vol. 18, pp. 9, 28, 37, 40), both Penn Water and Consolidated having taken the position that the restrictive provisions thereof were an inseparable part of the contract.* The District Court for Maryland also expressly held that the entire Safe Harbor contract was invalid, not merely the restrictive provisions thereof. In so holding it rejected the argument of Consolidated that the restrictive provisions were separable (Consolidated having taken a different position with respect to the separability of the Safe Harbor contract than it did with respect to the separability of the Baltimore contract), and the District Court for Maryland called these restrictive provisions "the warp and weft of the agreement" (97 F. Supp. 952, 955) (R., Vol. 18, p. 45). The specific restraints on contracts for purchase and sale of power and on plant expansion are not only inseparable from the other parts of the contracts, but are reaffirmed throughout the contracts as for example, in the provisions permitting representatives of Consolidated through the Operating Committee (R., Vol. 18, pp. 7-8) to veto any action on operating, engineering and accounting matters and in the payment provisions which remove any incentive to compete with Consolidated.

The courts in the Fourth Circuit therefore clearly held invalid and void *ab initio* in their entirety contracts upon which the FPC determinations as to the amount of the rate reduction, the allocation thereof and its jurisdiction over sales in Pennsylvania were based.

The misinterpretation by the D. C. majority of the scope of the Fourth Circuit's opinion would in itself be a sufficient reason for granting certiorari because such misinterpretation produces a direct conflict between two Courts of Appeal which this Court alone is in a position to rectify. More-

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* Consolidated has also stated in the Safe Harbor contract litigation that the restrictive provisions of the Baltimore contract were essential (Tr., p. 5689).

over, the D. C. majority itself clearly doubted the validity of its attempted distinction of the Fourth Circuit opinion, finding it necessary to hold, contrary to the Fourth Circuit, that it "would be at cross-purposes with the intent of Congress" (R., Vol. 18, p. 55) to deny the FPC power to override the prohibitions of the antitrust laws.

As to Question II: The decision of the D. C. Circuit holding that the FPC may, under the guise of a rate order, direct continuance of, and base its orders on, contractual arrangements which destroy Penn Water's independent corporate character by surrender to Consolidated of its managerial functions and initiative in violation of public policy and in excess of the power given it under the organic laws of its State of incorporation, is in direct conflict with the decision of the Fourth Circuit and is erroneous.

The D. C. majority ignored the decision of the Fourth Circuit on this public policy and state law point without discussion and, by affirming the FPC orders, indicated that public policy and state law were intended to be superseded by the Federal Power Act. The Fourth Circuit held directly to the contrary, pointing out (R., Vol. 18, p. 28) that the FPC should approve some method of sale of electric energy between Penn Water and Consolidated which "will not offend either the anti-trust laws *or the utility laws of Pennsylvania*" (italics supplied). This objective can be accomplished by employing the type of unit rate for capacity and energy schedule generally in use between utilities throughout the United States.

The Baltimore and Safe Harbor contracts are not only invalid under the Pennsylvania statutes and public policy, as pointed out in the petition of the Pennsylvania Commis-

sion, but are also *ultra vires*,* as held by the District Court for Maryland (R., Vol. 18, pp. 77-78) in that they "destroy the corporate virility" of the seller by depriving its board of directors of the powers of management in violation of the corporate laws of Pennsylvania.**

The revenue pooling provisions of the contracts which the FPC *unquestionably* directed to be continued, are, like the other restrictive provisions, illegal under Pennsylvania law, and public policy, as well as under the antitrust laws, because of their destructive effect upon initiative with respect to rates and services. See the *Chicago, Milwaukee & St. Paul Railway* case, *supra*, 61 Fed. at p. 997.

The extraordinary authority to compel a state corporation to carry out a contract which destroys its independent corporate character and which violates the law of the sovereign which has created it cannot be found in, or even implied from any provision of, the Federal Power Act. On the contrary, Section 201(a) provides that the Federal regulation authorized thereunder is "to extend only to those matters which are not subject to regulation by the States."

Where Congress intended to permit a Federal regulatory body to modify the powers of a state corporation it has specifically so provided; Interstate Commerce Act, Sections 5(11) and 20b(5) (49 U. S. C. §§5(11), 20b(5)). Even under such provisions there would be no authority to require a state corporation to continue an arrangement such as the Baltimore contract which destroys its inherent corporate character in violation of the law of its state of incorporation. Any attempt to grant such authority would

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* Decisions holding contracts which deprive corporate directors of management powers to be *ultra vires* and void are: *Sherman & Ellis* v. *Indiana Mutual Casualty Co.*, 41 F. 2d 588 (7th Cir. 1930), cert. den. 282 U. S. 893; *Dubbs* v. *Kramer*, 302 Pa. 455, 153 Atl. 733, 734 (1931); *Severance* v. *Heyl & Patterson, Inc.*, 123 Pa. Super. 533, 187 Atl. 53, 58 (1936); *Rosenthal* v. *Light*, 185 App. Div. 702, 173 N. Y. S. 743 (1919); *Smith* v. *California Thorn Cordage, Inc.*, 129 Cal. App. 93, 18 P. 2d 393 (1933); *Long Park, Inc.* v. *Trenton-New Brunswick Theatres Co.*, 297 N. Y. 174, 77 N. E. 2d 633 (1948).

** The Pennsylvania corporate statutes involved are set forth in Appendix C hereto.

constitute an unconstitutional encroachment upon states' rights under the Tenth Amendment.*

There are no such provisions in the Federal Power Act and they are not needed for regulation by the FPC of the rates which have been placed within its jurisdiction.

As to Question III: The decision of the D. C. Circuit holding that Part II of the Federal Power Act repeals by implication provisions of Part I and is applicable to Penn Water as a licensee under Part I conflicts with statements of the Second Circuit and another panel of the D. C. Circuit, and is erroneous.

While the decision of the D. C. Circuit is consistent with a decision of the Third Circuit** involving Safe Harbor in so far as it holds Part II applicable to licensees, these decisions are in conflict with statements of the Court of Appeals for the Second Circuit*** and of another panel of the D. C. Circuit itself,† both of which recognized that Part II was not applicable to licensees. The decision of the D. C. Circuit moreover is in conflict with the decision of the Third Circuit referred to above, and another earlier decision of the Third Circuit,‡ also involving Safe

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* Thus, an attempt under the Federal Government's fiscal powers to give, by statute, a state banking corporation the power which it did not otherwise have to convert itself into a Federal corporation was rejected as unconstitutional in *Hopkins Federal Savings and Loan Association* v. *Cleary*, 296 U. S. 315 (1935). An attempt under the bankruptcy power of the Federal Government to revive a state corporation which had been dissolved under state law was similarly rejected in *Chicago Title & Trust Co.* v. *41-36 Wilcox Bldg. Corp.*, 302 U. S. 120 (1937). It would not appear that the Federal Government has greater power under the Commerce Clause of the Constitution.

** *Safe Harbor Water Power Corp.* v. *FPC*, 179 F. 2d 179, 185 (1949), cert. den. 339 U. S. 957 (1950).

*** *Niagara Falls Power Co.* v. *FPC*, 137 F. 2d 787, 792, 793 (1943).

† *Alabama Power Co.* v. *FPC*, 128 F. 2d 280, 293 (1942).

‡ *Safe Harbor Water Power Corp.* v. *FPC*, 124 F. 2d 800, 808 (1941) cert. den. 316 U. S. 663 (1942).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,

Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,

Respondents.

APPENDICES B AND C TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Harbor, in so far as it holds that Part II repealed by implication certain regulatory provisions of Part I of the Act, whereas both these Third Circuit decisions held that licensees were subject to regulation under Part I (the later decision holding them subject to regulation under both Parts I and II).

If Part II is not applicable, then clearly there is no basis for the D. C. Circuit's decision that the regulatory features of Part II repeal, by implication, Section 10(h) of Part I and the antitrust laws and permit the FPC to require perpetuation of arrangements illegal thereunder.

Part II was not intended to be applicable to electric utilities licensed under Part I because (a) Part I contains within itself a complete set of provisions for the governance of licensees, including their rights and obligations with respect to the licensor-government and regulatory provisions applicable to both wholesale and retail sales, and was reenacted in 1935 when Part II first became law, (b) careful distinction is drawn between "licensees" under Part I and "public utilities" under Part II in the use of these terms throughout Parts I, II and III, (c) there are essential differences in the regulatory schemes provided in Parts I and II, and (d) the Federal Water Power Act of 1920 (reenacted as Part I of the Federal Power Act) was designed to stimulate and encourage private investment in hydroelectric projects,* and provided that no amendment should affect the rights of any license-holder, so that it is clear that Congress did not intend to change the situation of licensees by enactment of Part II.

It is respectfully submitted that the petition should be granted.

WILKIE BUSHBY
RANDALL J. LEBOEUF, JR.
JAMES PIPER
RAYMOND SPARKS
Counsel for Petitioners.

November 16, 1951.

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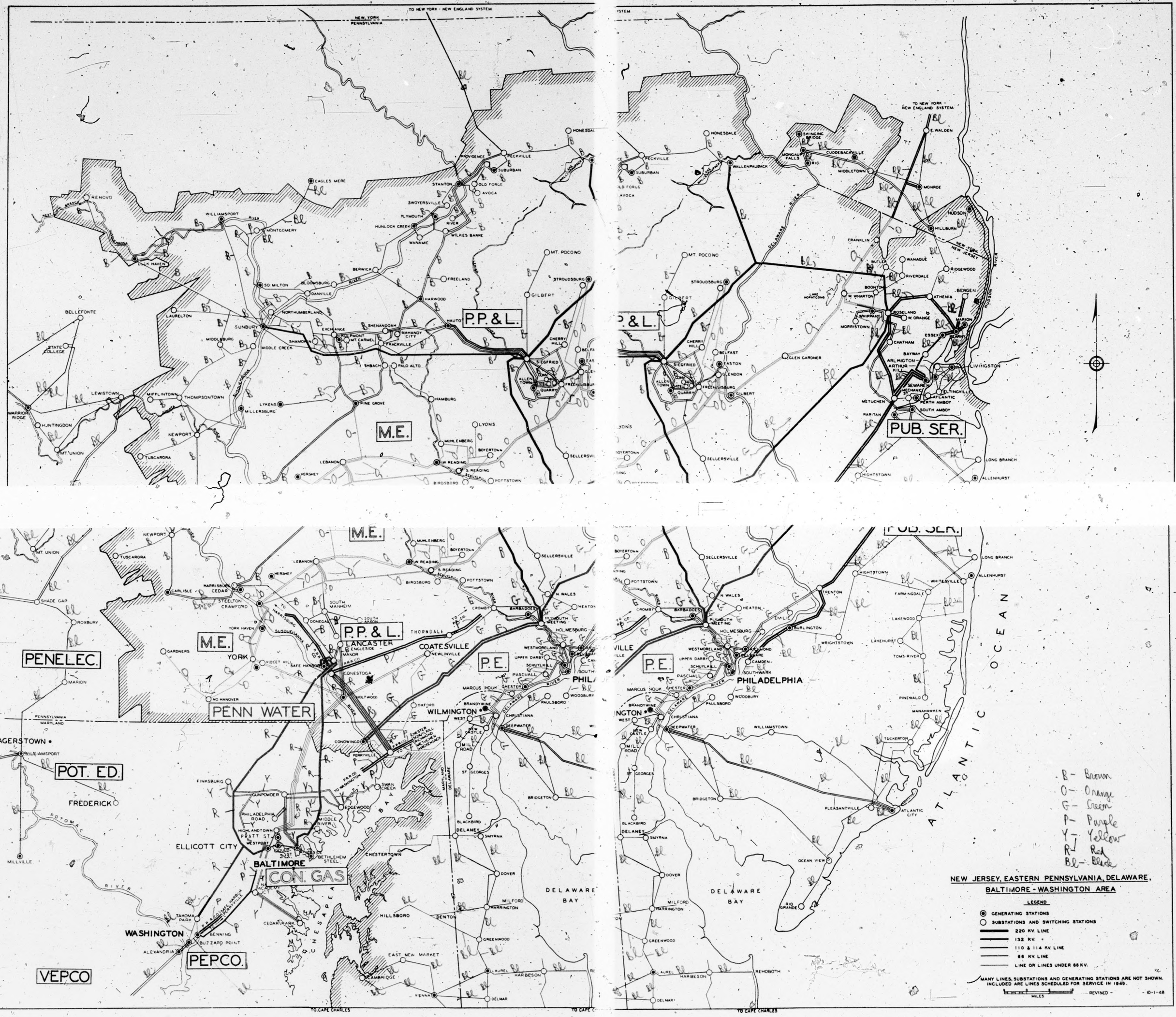
* *Grand River Dam Authority* v. *Grand Hydro*, 335 U. S. 359, 372 (1948); *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U. S. 152, 180, Note 23 (1946).


NEW YORK PENNSYLVANIA
TO NEW YORK - NEW ENGLAND SYSTEM
P.P. & L.
M.E.
PUB. SER.
PENELEC.
P.P. & L.
M.E.
PENN WATER
P.E.
POT. ED.
CON. GAS
PEPCO.
VEPCO
P.E.
PHILADELPHIA
ATLANTIC OCEAN
DELAWARE BAY
B- Brown
O- Orange
G- Green
P- Purple
Y- Yellow
R- Red
Bl- Black
NEW JERSEY, EASTERN PENNSYLVANIA, DELAWARE, BALTIMORE - WASHINGTON AREA
LEGEND
GENERATING STATIONS
SUBSTATIONS AND SWITCHING STATIONS
220 KV. LINE
132 KV. "
110 & 114 KV. LINE
66 KV. LINE
LINE OR LINES UNDER 66 KV.
MANY LINES, SUBSTATIONS AND GENERATING STATIONS ARE NOT SHOWN. INCLUDED ARE LINES SCHEDULED FOR SERVICE IN 1949.
MILES
REVISED - 10-1-48
TO CAPE CHARLES

APPENDIX B

Dissenting Opinion of Wilbur K. Miller, District of Columbia Circuit Judge.

Filed October 4, 1951.

WILBUR K. MILLER, Circuit Judge, *dissenting:* It is my view that this court should have granted petitioners' motions to annul the rate reduction orders of the Federal Power Commission. The decision of the United States Court of Appeals for the Fourth Circuit, which held null and void the contractual arrangement between Pennsylvania Water & Power Company and Consolidated Gas Electric Light and Power Company of Baltimore, to which the orders were intended to apply prospectively, imperatively required that the case before us be remanded to the Commission to work out with the utilities some different plan for interchange of energy which would not violate any state or federal law and which would not be contrary to public policy. This should have been done because the Commission's orders stood in a vacuum after the Fourth Circuit held the contract invalid; the only service to which they can have application may not lawfully be continued.

But the Commission has ordered the two companies to continue to observe and be governed by all the provisions of the old contract which are "in and of themselves lawful,"—a qualification which overlooks the fact that the Fourth Circuit condemned the contract in its entirety. And the majority of this court apparently hold that the Power Commission has authority to cause the *whole* contract to remain in effect, since they conclude that federal anti-trust laws do not apply to utilities regulated under Part II of the Federal Power Act. Relying on that theory, my brethren say,

"The motions to set aside or to remand the Commission's orders on the basis of the Fourth Circuit's decision and the other points referred to above are denied."

It is thus clear that, despite the voluminous record in this case,[1] the numerous and sometimes lengthy briefs, and three days of oral argument, the basic issue is a simple one. Has the Federal Power Commission authority to order a combination of these two utilities under terms and conditions which, if arranged by private contract between them, would clearly violate the federal anti-trust laws and the public utility laws of Pennsylvania? If the Commission has such power, the majority have correctly denied the motions to annul and remand. If not, then those motions should have been granted. Before discussing what I regard as the basic question, it may be well to review somewhat in detail the proceeding before the Power Commission and the litigation in the Fourth Circuit.

I.

The Commission instituted in September, 1944, an investigation of the rates and charges of Penn Water, following which it entered an order on January 5, 1949, requiring a large reduction in Penn Water's annual revenue. The major portion of the reduction was allocated to Consolidated; indeed, the reduction ordered in Penn Water's charges against that company exceeded by approximately $500,000 the sum which Consolidated had paid Penn Water during the "test year" of 1946. The Commission interpreted the 1931 contract as entitling Consolidated to all Penn Water's energy except that required to meet its firm

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[1] The Power Commission filed with us a transcript in 75 volumes containing an aggregate of 26,876 pages. Appendices prepared by the parties abbreviated that bulk to 17 volumes containing 5,338 printed pages.

commitments to other customers; as a result of that interpretation the Commission concluded that very substantial sales by Penn Water to others had really been for the account of Consolidated, and allocated the reduction accordingly.

The rate order was accompanied by a lengthy opinion which makes it clear that the Commission assumed the continuance of the 1931 contract and based its order, which was to operate prospectively, upon the relationship created by that instrument as it construed it.

For example: (a) The Commission's jurisdictional findings as to the use of Penn Water's facilities for the transmission of electric energy at wholesale in interstate commerce were based upon the assumption that the method of operation required by the contract of 1931 would continue. (b) The allocation of cost of service which the Commission made was premised upon its interpretation of Consolidated's entitlements and Penn Water's obligations under the 1931 contract. (c) The rate of return which the Commission allowed Penn Water was largely based upon the financial security which the Commission though Penn Water enjoyed under the 1931 contract. Moreover, the form of rate schedule later prescribed followed the residual-entitlement, specified-return formula of the 1931 contract.

Having observed the patent fact that the rate reduction order was based upon, and applied only to, the combination of facilities and interchange of energy set up by the 1931 contract, Penn Water applied to the Power Commission on January 28, 1949, for a rehearing. It sought to show that the order ought not to be premised upon a contractual relation which it regarded as illegal and which, if judicially found unlawful, could not continue to exist.

Among other things, Penn Water pointed out to the Commission that on December 20, 1948, after the record in the Commission's proceeding had been closed, it had terminated the 1931 contract by notice to Consolidated; and that it had sued Consolidated in the United States District

Court for the District of Maryland for a declaration that the contract was invalid and unenforceable.[2]

Apparently this was the first time the Federal Power Commission had been officially informed that Penn Water had given notice of termination of what the Commission calls the "system foundation contracts," and that Penn Water considered them violative of the anti-trust laws and the

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[2] In the course of its application for rehearing, Penn Water stated to the Commission:

> "(c) Since the record in the proceeding has been closed the purported contract referred to as supplemented, has been terminated by notice dated December 20, 1948; and if given the opportunity on rehearing Petitioners hereby offer to prove:
>
> "(i) The fact of such termination;
>
> "(ii) The contract was null, void, and unenforceable because the basic agreements were made at a time when Penn Water and Baltimore Company [Consolidated] were affiliated through substantial ownership by Baltimore Company of Penn Water stock and by interlocking directors and officers; the basic agreements were never approved or ratified by the stockholders of Penn Water; the effect of Articles IV and V of the supplemental agreement of June 1, 1931, particularly as construed in practice by Baltimore Company, made the contract *ultra vires* and contrary to public policy; and such supplemental agreement constituted an agreement in unreasonable restraint of trade and in unreasonable restriction of competition in the generation and sale of electrical services, and unreasonably limited the output of electrical energy contrary to the laws of the United States, including Section 1 of the Sherman Antitrust Act of July 2, 1890 (15 U. S. C. 1946 ed. § 1; 26 Stat. 209, 50 Stat. 693), Section 5 of the Federal Trade Commission Act of September 26, 1914 (15 U. S. C. 1946 ed. § 45; 38 Stat. 719), and Section 10(h) of the Federal Power Act (16 U. S. C. 1946 ed. § 803(h); 41 Stat. 1068, 49 Stat. 842), and to the laws of Maryland and Pennsylvania.
>
> "(iii) Baltimore Company committed material breaches of the contract which justified its termination; and
>
> "(iv) The foregoing matters are now in litigation between Penn Water and Baltimore Company on complaint of Penn Water for declaratory and other relief, before the United States District Court for the District of Maryland, Civil Action No. 4179."

utility laws of Pennsylvania and had sued for a declaration to that effect.

On February 26, 1949, the Power Commission denied the application for rehearing and filed an opinion in response to it, in the course of which it said:

> ". . . If there are questions as to the legality of the foundation contracts which are in litigation, as Respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions. In our opinion and order *we took care to leave the continuation of the operation of the integrated and interconnected system*[3] *in full effect, merely changing the rates,* as shown by our statement wherein we specifically stipulated that
>
> "'The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. *That arrangement will, therefore, be continued* with, however, such modifications as are necessary to accomplish the reductions mentioned above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company.'" (My emphasis.)

Later in 1949—on October 27—the Commission prescribed a rate schedule for Penn Water's service to Consolidated which was designed to effectuate the reduction in Penn Water's revenue which it had ordered on January 5. The last paragraph of the October order is as follows:

> "The foregoing provisions supersede only the rates and charges heretofore made, demanded, collected or assessed against Baltimore Company by

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[3] This refers, of course, to the two sets of facilities as operated under the contract.

> Penn Water and Transmission Company. All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force."

The revenue reduction order of January 5, 1949, and the rate order of October 27, 1949, are those which this court was asked to review.

II

While the proceeding before the Power Commission, which has just been described, was in progress, the litigation in the Fourth Circuit began. As of June 1, 1931, Penn Water and Consolidated, which were then under common dominance, had drastically amended a previously existing contract between them so as to form a combination of their utility facilities under terms which made Penn Water a virtual vassal of Consolidated. Fifteen years later the two corporations ceased to be under common control and thereafter each was managed independently. But the basic contract of 1931, burdensome and restrictive as to the Pennsylvania company, not only continued to define and govern the relationship between the two utilities, but by its terms was to endure until 1980,—a bleak prospect indeed for Penn Water.

Due to differences and disputes which developed, Consolidated invoked the arbitration provisions of the contract on September 1, 1948. Shortly thereafter, Penn Water instituted suit in the United States District Court at Baltimore, asking that the arbitration provisions be declared unenforceable and that Consolidated be enjoined from proceeding thereunder. It gave notice of termination to Consolidated and in an amended complaint asked that the 1931 agreement be struck down in its entirety.

Thereupon Consolidated applied to the District Court for a restraining order and on February 9, 1949, the court restrained Penn Water, pending final determination of the issues, from doing anything in respect to the generation, transmission and disposition of power covered by the 1931 agreement in any manner different from the procedure theretofore followed in the performance of the contract. The District Court filed an opinion[4] on February 29, 1950, declaring the 1931 contract valid, and directing arbitration to proceed.

Penn Water appealed to the United States Court of Appeals for the Fourth Circuit and that court, on September 30, 1950, handed down an exhaustive opinion[5] reversing the judgment of the District Court. The appellate court held the 1931 contract invalid as contrary to public policy and as violative of the Sherman and Clayton Acts and the public utility laws of Pennsylvania. In the course of the opinion, the Fourth Circuit said (at page 568):

> "... It may well be, although the *present arrangement* between the Maryland and Pennsylvania utilities is invalid for the reasons set forth, that an interconnection of facilities and an interchange of electrical energy between them may be continued by some method that would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania." (Emphasis supplied.)

Consolidated's petition for *certiorari* was denied by the Supreme Court on December 11, 1950,[6] as a result of which

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[4] *Pennsylvania Water & Power Co.* v. *Consolidated Gas Electric Light & Power Co.*, 89 F. Supp. 452.

[5] *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 184 F. (2d) 552.

[6] *Consolidated Gas Electric Light & Power Co.* v. *Pennsylvania Water & Power Co.* and *Hessey et al., constituting the Public Service Commission of Maryland* v. *Pennsylvania Water & Power Co.* (two cases), 340 U. S. 906.

the case went back to the District Court for entry of a declaratory judgment in accordance with the opinion of the Court of Appeals for the Fourth Circuit. After the remand, a controversy arose in the District Court as to whether the invalidation of the 1931 agreement had revived an agreement of 1927 between the parties for the interstate sale and delivery of electric energy so that Consolidated was entitled to continued deliveries by Penn Water, in accordance with the terms set forth therein, regardless of the invalidity of the amendatory contract of 1931. In response to a motion by Penn Water that the Fourth Circuit interpret its mandate and settle the controversy, that court delivered a second opinion on January 10, 1951.[7]

The court held the earlier agreement of 1927 was not revived when the amendatory contract of 1931 was declared illegal, and reiterated in unmistakable terms its former holding that the 1931 contract was invalid in its entirety. In the course of the opinion, the Fourth Circuit said (186 F. (2d) at 937) that by entering into the amendatory contract

> ". . . Penn Water gave up its independent status as a producer and seller of electric energy and subjected itself so completely to the dominance of Consolidated as to violate the controlling statutes and *hence the 1931 agreement must be stricken down.*
>
> ". . . Here the prior contract has been merged in and its nature changed by the subsequent unlawful agreement, and as so changed, it has resulted in *an unlawful relationship which has continued for twenty years.* When the illegality of such relationship is declared, it is idle to contend that the court can withdraw the original contract from the illegal relationship and give validity, certainly after it has been buried therein for so long a period. *It must perish*

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[7] *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Electric Light & Power Co.*, 186 F. (2d) 934.

along with the relationship of which it has been made an inseparable part.

* * * * * *

"Throughout the trial of this case and in the argument of the pending motion, Penn Water has reiterated its desire to continue to supply electric energy to Consolidated; and in view of the close relationship between the parties, the existence of interconnecting equipment and the control over its rates by the regulatory bodies, there is no reason to fear that the interests of consumers of electricity in Maryland will suffer through *the invalidation of the existing contract* between the two utilities.

"The District Court should issue a declaratory judgment (1) setting aside its judgment and order of March 18, 1950; (2) *declaring that the agreements of December 31, 1927, June 1, 1931 and September 29, 1939 are void and of no effect;* and (3) dissolving the restraining order of February 9, 1949." (Emphasis supplied.)

Presumably the District Court at Baltimore then entered a judgment declaring the agreements between Penn Water and Consolidated to be void and of no effect, as it had been directed to do. There was no equivocation or limitation in the Fourth Circuit's directive. It did not simply hold void the restrictive provisions, but condemned the 1931 agreement in its entirety. This was obviously because the court considered that the whole arrangement depended upon the restrictions which fettered Penn Water and that the paragraphs containing the restrictions, therefore, were not severable from the remainder of the contract. This appears from the following excerpt from the Fourth Circuit's opinion (186 F. (2d) at 936):

"The 1931 agreement, on the other hand, provided that Consolidated should be entitled to all the electric capacity and energy available to Penn Water and not

otherwise disposed of in the performance of existing contracts, and in consideration thereof, Consolidated agreed to pay Penn Water an amount equal to its operating expenses, a specified rate of return on existing facilities, and on the cost of new facilities less depreciation, and Consolidated was allowed a credit for the amount of the sales of energy by Penn Water to other persons. Closely associated with these provisions were the illegal restrictions on the future activities of Penn Water which resulted in the invalidation of the whole contract. Therein Penn Water was required to obtain the approval of Consolidated before entering into any agreement for the sale or purchase of electric power and energy and to obtain the approval of Consolidated before making any investment or disposing of its property having a value in excess of $50,000. These restrictive conditions were included in order to safeguard Consolidated in the performance of its promises and it is conceded that without them the contract would have been impracticable and would not have been made."

Although a final judgment of a court of competent jurisdiction had thus invalidated the entire contract between Penn Water and Consolidated, the Federal Power Commission still regarded it as desirable and in the public interest that the facilities of the two companies be operated as one integrated and interconnected system. Being of that opinion, the Commission was understandably anxious that the co-operative use of facilities and interchange of energy be continued. I think it should have called the parties in and required them to work out immediately a new contract in conventional form which would accord with the opinions of the Court of Appeals for the Fourth Circuit. The Commission thought, however, that the Fourth Circuit meant only to condemn the two paragraphs of the 1931 agreement which prohibited Penn Water from selling or buying energy and from increasing or reducing its plant investment without Consolidated's consent. It reasoned that it could require

the continuance of the old contract if those paragraphs were eliminated. This would leave in effect the contractual definition of Consolidated's residual entitlements and the residual payment type of rate. But the Fourth Circuit said those provisions were so closely associated with the illegal restrictions on the future activities of Penn Water that the whole contract was invalid. The court's opinions make abundantly clear its intention to strike down the entire arrangement,—not just the restrictive provisions.

It is significant that Penn Water and Consolidated conceded that, without the unlawful restraints on the former, the 1931 contract would have been impracticable and would not have been made. That was an admission that the restrictions and the remainder of the contract were so "closely associated" that illegality of the restrictions resulted in complete invalidity. Even if the unlawful paragraphs of the agreement were severable, the remaining provisions would be incompatible with the Fourth Circuit's decision because under them free and unrestrained competition would still be impossible. Welding the facilities of the two companies into one integrated system—the Commission's objective—is not conducive to competition.

III.

After the "system foundation contracts" had been held null and void, Penn Water entered a motion in this court on December 29, 1950, asking that we

> "... set aside, annul and dismiss the orders of the Commission sought to be reviewed in these proceedings, or, in the alternative, remand these proceedings to the Commission with instructions to annul and set aside its orders herein sought to be reviewed ...."

The Pennsylvania Public Utility Commission also moved this court on December 29, 1950,

> "To annul and dismiss the orders of the Federal Power Commission sought to be reviewed in Case

No. 10,239 on the ground that the decision of the United States Court of Appeals for the Fourth Circuit in *Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland*, 184 F. 2d 552 (1950), *cert.* denied December 11, 1950, renders invalid, null, void and of no effect the orders of the Federal Power Commission and the proceedings before it pursuant to which said orders were issued."

The question presented by these motions was what I have called the basic issue: can the Federal Power Commission lawfully establish between Penn Water and Consolidated a relationship which constituted a violation of the anti-trust statutes when established by contract between them? One who considers that question should bear in mind three indisputable propositions: 1. Regulated industries are not *per se* exempt from the Sherman Act. 2. Part II of the Power Act does not give the Commission power to lift the ban of the anti-trust laws. 3. As repeals by implication are not favored, only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *Georgia* v. *Pennsylvania Railroad Company*, 324 U. S. 439, 456-7 (1945); *United States* v. *Borden Company*, 308 U. S. 188, 198 *et seq.* (1939).

In denying the motions and holding that the Commission has such power, the majority of the court necessarily first concluded that Part II of the Federal Power Act had impliedly repealed or superseded the anti-trust statutes so as to exempt from their prohibitions the combination between Penn Water and Consolidated which the Commission ordered to continue.

In order to show in bold relief the thinking of my brothers of the majority which led them to that conclusion, I have skeletonized the pertinent portion of their opinion:

"The problem raised by the motions is one of the interrelation of two statutory schemes—each of which reflects different historical pressures and different conceptions of the public interest. The Sherman Act and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market. . . . In marked contrast is a statute such as Part II of the Federal Power Act. It evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant. . . .

"These contrasting objectives indicate that the antitrust laws can have only limited application to industries regulated by specific statutes. . . .

" . . . The net effect of what we have already said is that, though regulated industries are not *per se* exempt from the antitrust laws and repeals by implication are not favored, the antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them. . . . where a statute provides for comprehensive and detailed regulation of a particular industry, as do the Interstate Commerce Act and the Federal Power Act, there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions."

These generalities boil down to the thesis that Part II of the Federal Power Act is repugnant to the anti-trust laws and therefore supersedes them to the extent of the repugnancy; and that the repugnancy extends so far as to exempt from the anti-trust laws the combination of utilities ordered by the Commission which is otherwise clearly illegal under those statutes.

The majority do not point out with particularity the repugnancy upon which they rely. They seem to find it

in the "contrasting objectives" of the anti-trust acts and Part II of the Power Act, saying the first was designed to obtain the benefit of free competition, and the other to eliminate competition as having no place in the utility field and to substitute for it a regulatory agency. This being the only repugnancy suggested by the majority, their holding necessarily is that the anti-trust laws are superseded by Part II of the Power Act to the extent that the *objectives* of the two forms of legislation are in contrast. Let us see if there is really any repugnancy between the Sherman Act and Part II of the Power Act.

The first section of the former, which is 15 U. S. C. §1, declares illegal every contract, combination or conspiracy in restraint of trade or commerce. The 1931 contract between Penn Water and Consolidated was held violative of that section.

Section 202, found in Part II of the Power Act, empowers the Commission to require the interconnection and co-ordination of the facilities of the two utilities. But neither that section nor any other section of Part II authorizes the Commission to require interconnection and co-ordination of facilities under terms and conditions which will result in a violation of the Sherman Act. The Commission can exercise its power under §202 and under all of Part II without setting up an arrangement which is unlawful under anti-trust statutes. The Fourth Circuit intimated as much when it suggested that the interconnection of facilities and interchange of energy be continued "by some method which would meet with the approval of the appropriate regulatory authority and will not offend either the anti-trust laws or the utility laws of Pennsylvania." The majority opinion does not suggest any reason why that cannot be done by the Commission.

Since the Power Commission can perform all its functions under Part II without creating a violation of the Sherman Act, there is no repugnancy between the two statutes, and no room for the court to say that Part II superseded the anti-trust statutes.

I have said, as did the Fourth Circuit, that neither Part I nor Part II of the Federal Power Act purports to suspend the anti-trust statutes with respect to licensees and utilities regulated thereunder. On the contrary, §1 of the Sherman Act is substantially repeated in §10(h), found in Part I of the Power Act, 16 U. S. C. §803(h), which is as follows:

> "Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."

Penn Water is a licensee under Part I of the Act and so is subject to the prohibitions of §10(h). The majority considers that the omission of that section from Part II not only repealed §10(h) but also amounted to a repeal of the prohibitions of the Sherman Act as far as regulated companies are concerned. That amounts to saying that the anti-trust laws do not apply to any regulated industry unless their provisions are substantially repeated in the regulatory statute. Just the opposite is true: the anti-trust laws apply to regulated industries unless exemption therefrom is expressly provided in the regulatory statute, or must inevitably be implied from provisions of the regulatory act which are clearly repugnant to anti-trust prohibitions.

It must be noted, too, that Penn Water does not lose its status as a licensee under Part I simply because it is regulated also under Part II. It continues, nevertheless, to be a licensee and so continues to be forbidden by §10(h) to engage in the combinations or arrangements made illegal thereby. It follows that, when the Commission required Penn Water and Consolidated to remain in the combination which had been condemned by the courts, it not only did not act under the authority of Part II which gives it no such power, but also affirmatively violated §10(h) of its own basic act.

The majority opinion says, however, that when a Part I licensee is also a Part II company, as Penn Water is, it is no longer subject to the anti-trust provisions of §10(h), simply because the language of that section does not appear in Part II. Then the notion that §10(h) was repealed by Part II is thus stated in the opinion:

> ". . . The prohibitions of §10(h) would apply to a licensee which is also regulated under Part II only to the extent that the prior statute is not repealed by the clear repugnancy between it and the later statute."

I suppose the court meant to say that Part II is clearly repugnant to §10(h) because it does not contain similar language and therefore repealed that section by implication. But Part II is not repugnant to §10(h) for the same reasons that it is not repugnant to the anti-trust laws: it is not necessary for the Commission to cause a violation of §10(h) in order fully to exercise its regulatory power under Part II over a Part I licensee which is subject to Part II regulation.

One other phase of the portion of the court's opinion which denies the motions remains to be noticed. It is that in which the court purports to give another reason for denying the motions to annul, in addition to the fallacious theory that the antitrust laws do not apply to regulated industries. On examination, however, the additional ground is seen to rest upon the same erroneous idea. It is thus stated in the opinion:

> "To grant petitioners' motions and set aside the order at this time would be to substitute antitrust criteria for those of the Federal Power Act, . . ."

By this the court meant that it would be improper to annul the Commission's orders on the mere ground that "a decision handed down in a suit between private parties under a non-controlling statute" had destroyed the only arrangement to which they could possibly have application.

If Penn Water "wishes," because of the Fourth Circuit's decision, to make some change in the old contractual arrangement which the Commission has ordered to be retained, the majority say the only thing it can do is to submit its proposed new arrangement. Then, after the Commission has disposed of the proposal, Penn Water can file a new petition for review if it feels aggrieved. That would be true if Penn Water wanted to change an existing *legal* arrangement.

The key error in the court's reasoning is revealed by its allusion to the decision of the Fourth Circuit as one "handed down in a suit between private parties under a non-controlling statute." It shows that in assigning this additional reason for denying the motions to annul, the court is still assuming that the Commission can lawfully require these utilities to form a combination which they cannot legally form by their own contract.

I think I have shown sufficiently already that the Sherman Act *is* the controlling statute which the Commission is not empowered to override. That the judgment invalidating the existing arrangement was handed down in a suit between private parties is, of course, immaterial. It is binding on those private parties, yet this court has required them to disobey it. It has done so upon the erroneous idea that the Sherman Act has been superseded by Part II of the Federal Power Act and so is not the "controlling statute."

In the portion of the majority opinion now being discussed, the court says it is the existing "services and rates, reflecting underlying operations, which were the subject of the Commission's orders." The implication is that all the Commission has done is to prescribe rates for service actually being rendered; that if the rates are just and reasonable for that service, and if the Commission's findings in that respect are supported by substantial evidence, "our review is at an end." I suggest that the "underlying operations" were the subject of the Commission's orders and therein lies the vice in them. They did not deal with rates alone but ordered the contractual "underlying operations" to continue.

It is a boot-strap argument to say that, because the Commission has power to prescribe rates for existing service so long as it is being rendered, it can therefore require continued rendition of the service no matter if it is unlawful.

For the reasons given, I think the motions to annul the Commission's order should have been granted, and so I dissent. My brothers of the majority, having denied the motions, then proceeded to explore the merits of the rate reduction order and the implementing rate schedule which the Commission prescribed, and affirmed those orders. I dissent also from that action, as I think the orders should have been set aside as improper. But I do not prolong this dissent by discussing the merits of the orders, as I think it perfectly clear that they should have been set aside as being without basis or applicability after the Fourth Circuit's judgment became final.

APPENDIX C

TEXT OF PERTINENT PENNSYLVANIA LAWS GOVERNING CORPORATIONS

(EXCERPTS)

Section Five of Corporation Act of 1874.*

The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that purpose, * * *. The members of said corporation may, at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs, and a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum * * *.

Section one of Act of May 31, 1887, P. L. 281 (No. 166).

SECTION 1. *Be it enacted, &c.,* That it shall be lawful, from and after the passage of this act, for any corporation, chartered or existing by or under any law of this State, to determine, by the vote of its stockholders holding a majority in interest of all of its stock, at a meeting duly called for the purpose, the time of holding the annual meeting for the election of officers of the corporation, and the number of directors that shall thereafter govern its affairs: *Provided,* That the number of directors so determined shall not be less than three nor more than fifteen, and that at least one third of the directors of every corporation shall be and remain, during their term of service, residents of the State of Pennsylvania: * * *.

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* As amended by Act of May 14, 1891, P. L. 61, and Act of May 6, 1927, P. L. 828 (No. 417).